

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT NASHVILLE  
July 20, 2004 Session

**MOSES COURY v. BRUCE WESTBROOKS, WARDEN**

Direct Appeal from the Circuit Court for Williamson County  
No. 203-081 Russ Heldman, Judge

---

No. M2003-01800-CCA-R3-PC - Filed October 19, 2004

---

The petitioner, Moses Coury, filed an application for writ of habeas corpus or in the alternative a petition for post-conviction relief. The trial court dismissed the petition without a hearing, and the petitioner timely appealed. Upon review of the record and the parties' briefs, we affirm the judgment of the trial court.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court is Affirmed.**

NORMA MCGEE OGLE, J., delivered the opinion of the court, in which JOSEPH M. TIPTON and ROBERT W. WEDEMEYER, JJ., joined.

David A. Collins, Nashville, Tennessee, for the appellant, Moses Coury.

Paul G. Summers, Attorney General and Reporter; Helena Walton Yarbrough, Assistant Attorney General; Ronald L. Davis, District Attorney General; and Derek K. Smith, Assistant District Attorney General, for the appellee, State of Tennessee.

**OPINION**

**I. Factual Background**

The petitioner committed the offense of assault by ambush on June 15, 1981. On September 24, 1983, the petitioner was convicted as charged by a jury in the Williamson County Circuit Court and was sentenced to thirty-five years incarceration. This court affirmed the petitioner's conviction on direct appeal. State v. Coury, 697 S.W.2d 373 (Tenn. Crim. App. 1985). The petitioner subsequently filed a petition for post-conviction relief, alleging ineffective assistance of counsel at trial. This court affirmed the lower court's denial of that petition. Moses A. Coury v. State, No. 01C01-9007-CC-00174, 1991 WL 23743 (Tenn. Crim. App. at Nashville, Feb. 26, 1991). The petitioner is currently incarcerated at the West Tennessee State Penitentiary in Lauderdale County.

On February 25, 2003, the petitioner filed in the Williamson County Circuit Court an “Application for Writ of Habeas Corpus or in the Alternative a Petition for Post-Conviction Relief,” alleging that he should have been sentenced under the Criminal Sentencing Reform Act of 1982 and that his sentence is illegal and void.<sup>1</sup> The trial court treated the petition as one for post-conviction relief and entered an order appointing counsel. After the filing of an amended petition, the State filed a motion to dismiss, arguing that the petition was time-barred. The State argued in the alternative that if the petition were deemed to be one for habeas corpus relief, the petition must be dismissed for the petitioner’s failure to file the petition in compliance with Tennessee Code Annotated section 29-21-105 (2000), which requires that the petition be filed in “the court . . . most convenient in point of distance to the applicant . . .” The trial court granted the State’s motion and dismissed the petition, finding the petition to be barred by the statute of limitations for filing for post-conviction relief. The trial court further ordered that “any application for writ of habeas corpus should be filed in compliance with State law.”

The petitioner now brings this appeal, arguing,

- I. IT WAS ERROR FOR THE TRIAL COURT TO DISMISS THE [PETITIONER’S] PETITION FOR A WRIT OF HABEAS CORPUS.
- II. IT WAS ERROR FOR THE TRIAL COURT TO DISMISS THE [PETITIONER’S] PETITION FOR POST-CONVICTION RELIEF.
- III. THE DISMISSAL OF THE [PETITIONER’S] PETITION WITHOUT AN EVIDENTIARY HEARING VIOLATED THE [PETITIONER’S] DUE PROCESS OF LAW RIGHTS GUARANTEED UNDER THE 5TH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.
- IV. THE [PETITIONER] IS ENTITLED TO RELIEF FROM THE RECORD IN THIS CASE.<sup>2</sup>

## **II. Analysis**

Initially, we address the petitioner’s claim that the trial court erred by dismissing his petition as barred by the statute of limitations for filing for post-conviction relief. Although we affirm the trial court’s dismissal of the petition, we do so on different grounds.

The Post-Conviction Procedure Act of 1995 contemplates the filing of only one petition for post-conviction relief and provides for the summary dismissal of a subsequent petition if a previous

---

<sup>1</sup>In his petition, the petitioner also argued, “Due to the minimal culpability of the petitioner, the resulting sentence he received amounts to cruel and unusual punishment under the 8th Amendment to the Constitution of the United States.” However, the petitioner did not pursue this issue on appeal.

<sup>2</sup>We will address these issues in a different order than that in which they were raised.

petition has been filed and resolved on the merits. Tenn. Code Ann. § 40-30-102(c) (2003). The petitioner filed a previous petition for post-conviction relief, the dismissal of which this court affirmed in 1991. Moses A. Coury v. State, No. 01C01-9007-CC-00174, 1991 WL 23743 (Tenn. Crim. App. at Nashville, Feb. 26, 1991). Accordingly, the petitioner is barred from filing a second petition. However, under limited circumstances, a petitioner may file a motion to reopen a prior petition for post-conviction relief. Tennessee Code Annotated section 40-30-117(a) (2003) provides that a petitioner may file a motion to reopen the first post-conviction petition if:

- (1) The claim in the motion is based upon a final ruling of an appellate court establishing a constitutional right that was not recognized as existing at the time of trial, if retrospective application of that right is required . . . ; or
- (2) The claim in the motion is based upon new scientific evidence establishing that such petitioner is actually innocent of the offense or offenses for which the petitioner was convicted; or
- (3) The claim asserted in the motion seeks relief from a sentence that was enhanced because of a previous conviction and such conviction in the case in which the claim is asserted was not a guilty plea with an agreed sentence, and the previous conviction has subsequently been held to be invalid . . . ; and
- (4) It appears that the facts underlying the claim, if true, would establish by clear and convincing evidence that the petitioner is entitled to have the conviction set aside or the sentence reduced.

In his petition and on appeal, the petitioner contends that our supreme court's decision in Dixon v. Holland, 70 S.W.3d 33 (Tenn. 2002), established a constitutional right not recognized as existing at the time of trial.<sup>3</sup> We disagree.

In Dixon, our supreme court held that Dixon's sentence to life without the possibility of parole for kidnapping for ransom under Tennessee Code Annotated section 39-2603 (1975) was void and granted habeas corpus relief. Id. at 38. Tennessee Code Annotated section 39-2603 (1975) provided that any person convicted of kidnapping for ransom would be subject to a term of imprisonment "for life or for a term of years not less than twenty (20) *without possibility of parole*, at the discretion of the jury trying the same." However, after the commission of the offense but prior to Dixon's trial, this statute was amended as part of the Class X Felonies Act of 1979, and the amendment established the offense of aggravated kidnapping which included kidnapping for ransom. Tenn. Code Ann. § 39-2603 (Supp. 1979). A person convicted of aggravated kidnapping, a Class X felony, was subject to a sentence of twenty years to life *with possibility of parole*. Id. The savings statute in effect at the time of the offense and at Dixon's trial provided,

---

<sup>3</sup>The petitioner raised this argument in regards to the filing of his petition outside the statute of limitations for filing for post-conviction relief. See Tenn. Code Ann. § 40-30-102(a) (2003).

Whenever any penal statute or penal legislative act of the state is repealed or amended by a subsequent legislative act, any offense, as defined by such statute or act being repealed or amended, committed while such statute or act was in full force and effect shall be prosecuted under such act or statute in effect at the time of the commission of the offense. *In the event the subsequent act provides for a lesser penalty, any punishment imposed shall be in accordance with the subsequent act.*

Tenn. Code Ann. § 39-114 (1975) (emphasis added). The supreme court held that pursuant to the savings statute, Dixon should have been sentenced to life *with the possibility of parole*, the lesser penalty provided by the 1979 statute. Dixon, 70 S.W.3d at 37-38.

Contrary to the petitioner's contention, the holding in Dixon did not establish a new constitutional right. Instead, it clarified the law existing at the time of Dixon's sentencing. Accordingly, the holding in Dixon does not provide a basis for reopening the petitioner's first petition for post-conviction relief.<sup>4</sup>

The petitioner also contends that the trial court erred by dismissing his petition for failure to comply with Tennessee Code Annotated section 29-21-105 (2000). Under this statute, a petition for habeas corpus relief "should be made to the court or judge most convenient in point of distance to the applicant, unless a sufficient reason be given in the petition for not applying to such court or judge." The procedural provisions of the habeas corpus statutes are mandatory and must be scrupulously followed. Archer v. State, 851 S.W.2d 157, 165 (Tenn. 1993).

The petitioner filed his petition in the Williamson County Circuit Court; however, he is currently incarcerated in Lauderdale County. As reason for filing in the Williamson County Circuit Court, the petitioner averred,

[S]ince the [petition] is a dual request for relief, and petitions for post conviction relief are to be filed in the county of conviction, and since Petitioner's pro bono counsel is in Nashville, Tennessee; and in the interest of judicial economy, . . . [the Williamson County Circuit Court] is the proper forum for this action.

As previously noted, the petitioner is barred from filing a second petition for post-conviction relief. Moreover, we conclude that filing in the county which is more economical for counsel is not a "sufficient reason" under section 29-21-105 for filing a petition for habeas corpus relief in the court of conviction instead of the court most convenient to the petitioner.

---

<sup>4</sup>Moreover, even if the trial court had treated the instant petition as a motion to reopen, an appeal of the denial of a motion to reopen must be filed within ten days of the lower court's ruling. Tenn. Code Ann. § 40-30-117(c). The petitioner failed to comply with the statutory requirement for seeking appellate review.

Regardless, the petitioner fails to state a cognizable claim for habeas corpus relief. Tennessee law provides narrow grounds upon which habeas corpus relief may be granted. McLaney v. Bell, 59 S.W.3d 90, 92 (Tenn. 2001). In Tennessee, such relief may be sought only when the judgment is void, not merely voidable. Stephenson v. Carlton, 28 S.W.3d 910, 911 (Tenn. 2000). In other words, habeas corpus relief will be granted “only when it appears upon the face of the judgment or the record of the proceedings upon which the judgment is rendered that a court lacked jurisdiction or authority to sentence a defendant or that the sentence has expired.” Id. (citing Archer, 851 S.W.2d at 164). A trial court may summarily dismiss a petition for writ of habeas corpus without a hearing or the appointment of counsel if the petitioner fails to show that he is entitled to relief. Tenn. Code Ann. § 29-21-109 (2000); see also McLaney, 59 S.W.3d at 93.

In his petition and on appeal, the petitioner argues that he is entitled to habeas corpus relief because his sentence is void. Relying on Dixon, the petitioner argues that pursuant to the savings statute in effect at the time of his trial, he should have been sentenced under the Criminal Sentencing Reform Act of 1982, which provided for judicial sentencing and established ranges of punishment. In his petition, the petitioner asserts that had he been sentenced by the trial court as opposed to the jury, he would have likely received a lesser sentence. Specifically, the petitioner claims,

While it is true that theoretically [the petitioner] could have received the same sentence the jury gave him, that result is unlikely given the mitigating and enhancing factors a judge would have been required to apply at a sentencing hearing. Petitioner’s minor role in the offense alone would warrant a sentence less than the maximum 35 years.

The petitioner committed the instant offense on June 15, 1981, and was convicted and sentenced by the jury to thirty-five years incarceration on September 24, 1983. The Criminal Sentencing Reform Act of 1982 did not apply to offenses occurring prior to July 1, 1982. Under Tennessee Code Annotated section 40-35-112(a) (1982) (emphasis added),

All persons who commit crimes on or after July 1, 1982, shall be tried and sentenced under this chapter. For all persons who committed crimes prior to July 1, 1982, the prior law shall apply and shall remain in full force and effect in every respect, including but not limited to *sentencing*, parole and probation.

See also State v. Turner, 919 S.W.2d 346, 361 (Tenn. Crim. App. 1995). Accordingly, we conclude that the petitioner has failed to demonstrate that his sentence is void.

Finally, the petitioner contends that the trial court’s dismissal of his petition without a hearing violated his right to due process. However, as previously noted, “[a] trial court is not required, as a matter of law, to grant the writ and conduct an inquiry into the allegations contained in the petition.” Passarella, 891 S.W.2d at 627 (footnote omitted). “[W]here the allegations in a petition

for writ of habeas corpus do not demonstrate that the judgment is void, a trial court may correctly dismiss the petition without a hearing.” McLaney, 59 S.W.3d at 93; see also Tenn. Code Ann. § 29-21-109. Accordingly, this issue is without merit.

### **III. Conclusion**

Finding no reversible error, we affirm the judgment of the trial court.

---

NORMA McGEE OGLE, JUDGE